

July 12, 2005

Jim Gates  
142 Via Pasqual  
Redondo Beach, CA 90277

**Re: Your Request for Advice  
Our File No. A-05-112**

Dear Mr. Gates:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is solely based on the facts presented to us in your letter requesting advice. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and all of the material facts have been provided.

In addition, you have requested advice concerning the applicability of Government Code section 1090 to your situation. However, the Commission's authority is limited to interpreting and enforcing the provisions of the Act, and section 1090 is not included within the provisions of the Act. We must therefore refer you to the Attorney General's office for questions regarding Government Code section 1090.

## QUESTIONS

1. May you, as a member of the Torrance Airport Commission, participate in decisions concerning proposed changes to the Hangar Rental Agreement that is used for renting city-owned hangars at the Torrance Municipal Airport?

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<sup>1</sup> The Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

2. May you provide information and advice to Airport Commission staff concerning proposed changes to the Hangar Rental Agreement?<sup>2</sup>

3. If other persons express to the Airport Commission views concerning proposed changes to the Hangar Rental Agreement that are similar to yours, derived from public comments that you made prior to being appointed to the Airport Commission, does this place you in a conflict of interest situation?<sup>3</sup>

### **CONCLUSIONS**

1. You may not, as a member of the Torrance Airport Commission, participate in decisions concerning proposed changes to the Hangar Rental Agreement that is used for renting city-owned hangars at the Torrance Municipal Airport.

2. You may not provide information and advice to Airport Commission staff concerning proposed changes to the Hangar Rental Agreement.

3. While other persons are free to express to the Airport Commission views that may be similar to yours concerning proposed changes to the Hangar Rental Agreement, you are prohibited from using other people to indirectly communicate your views to the other members of the Torrance Airport Commission.

### **FACTS**

You are a newly-appointed member of the seven-member Airport Commission for the City of Torrance. You are one of three commissioners who rent hangars at the airport. You have rented a city-owned hangar at the airport for your pleasure-type aircraft since prior to 1990.

The City of Torrance wants to change some of the terms of its standard month-to-month Hanger Rental Agreement which governs the 339 city-owned hangars, but neither the 100 or more privately-owned hangars, nor the FBO operators. The Airport Commission will preliminarily approve any changes to the agreement, and then pass the modified agreement on to the city council, which may make its own changes, and then must approve the agreement in its

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<sup>2</sup> Your actual question sought advice concerning whether certain of your past communications with Airport Commission staff were permissible. As the Commission does not provide advice concerning past conduct, we are not able to answer that question, so will simply advise you regarding future communications of a similar nature. By doing this, we offer no opinion concerning your past conduct.

<sup>3</sup> In addition to these three questions, you also asked whether you have any conflict of interest problems now due to the fact that prior to being appointed to the Airport Commission you once served on an ad hoc committee that made recommendations to the Airport Commission concerning the content of hangar leases. As your service on the ad hoc committee is past conduct, we cannot provide you with any advice concerning that conduct. (Regulation 18329.) We are therefore dispensing with any further analysis of this question.

final form. Rental rates were set by the city council in a separate action two years ago, so none of the changes in the agreement will affect rental rates.

The Torrance Municipal Code requires the owner of any aircraft based at the airport to maintain insurance coverage in amounts not less than \$100,000 for bodily injury to each person, \$300,000 for each bodily injury occurrence, and \$100,000 for property damage. The current Hangar Rental Agreement for city-owned hangars requires the tenant to maintain the above-stated level of insurance coverage required by the code, as well as combined single limit coverage against liability or financial loss in the amount of \$1,000,000 for any injury to persons or damage to property in or about the hangar. A proposed change to the agreement will set the required coverage at: \$100,000 per person and \$1,000,000 per occurrence for bodily injury; and \$250,000 per occurrence for property damage; with a combined single limit of \$1,000,000; and require additional coverage for damage to the hangar or airport premises in the amount of at least \$1,000,000 per occurrence. You have voluntarily carried this proposed higher level of coverage for a number of years.

Another proposed new term of the rental agreement would expand the exposure of hanger tenants to liability “resulting solely from the negligence or willful misconduct of the city, its officers, employees or agents.” Thus, tenants signing the proposed new agreement would become exposed to liability from the actions of the city, its officers, employees, and agents, while other airport users would not be similarly exposed.

You have advised us that insurance coverage for the liability that tenants would be exposed to under the proposed changes to the rental agreement is not generally available. You surveyed half a dozen aviation insurance companies, and you were told that over ninety percent of hangar tenants would not be able to obtain such insurance. Those few tenants who would be able obtain the coverage would find their insurance premiums approximately doubled.

## **ANALYSIS**

### **QUESTION NUMBER 1 PARTICIPATION IN THE DECISION**

The conflict-of-interest provisions of the Act are intended to ensure that public officials “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (§ 81001, subd. (b).) To that end, section 87100 specifically prohibits any public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, that he or she has a financial interest. A public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s economic interests. (§ 87103; Reg. 18700, subd. (a).) The Commission has adopted a

standard eight-step analysis for determining whether an individual has a disqualifying conflict of interest in a given governmental decision. (Reg. 18700, subd. (b)(1)-(8).) This letter applies the eight-step analysis to the facts that you have presented to us, and renders advice based on the results of that analysis.

**Step One: Are you a “public official?”**

The term “public official” is defined by section 82048 of the Act, as follows:

“‘Public official’ means every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government.”

Regulation 18701, subdivision (a)(1) provides that “member” of a governmental agency<sup>4</sup> includes salaried or unsalaried members of a board or commission with decision-making authority. The same regulation also provides that a board or commission possesses decision-making authority whenever:

- “(A) It may make a final governmental decision;
- (B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or
- (C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.”

As a member of the Airport Commission, you are required by your jurisdiction’s conflict of interest code to file statements of economic interests as a person who makes or participates in making governmental decisions. Additionally, you have indicated that the Airport Commission makes decisions about the operation of the Torrance Municipal Airport, and then passes those decisions along to the Torrance City Council for final approval. Through this process, the Airport Commission may compel a governmental decision. As such, you as a public official under the Act.

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<sup>4</sup> Under Section 82041, a local governmental agency is defined as “a county, city, or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.”

**Step Two: By participating in a decision by the Airport Commission on changing the Hangar Rental Agreement are you making, participating in making, or influencing a governmental decision?**

Regulation 18702.1, subdivision (a) defines what is meant by “making a governmental decision.” Included in that definition is voting on a matter, appointing a person, obligating or committing one’s agency to a course of action, entering into a contract or agreement on behalf of one’s agency, and determining not to act upon a matter by doing any of those things.

Regulation 18702.2 defines what is meant by “participating in making a governmental decision.” Included in that definition is preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official, and the purpose of which is to influence a governmental decision.

Participating in a decision by the Airport Commission on changing the Hangar Rental Agreement, as it involves presenting analysis and opinion which requires the exercise of judgment in order to influence a governmental decision, would constitute participating in a governmental decision.

**Step Three: What are your economic interests?**

The only potential economic interest you have identified in your request for advice is your leasehold interest in a hangar at the airport. You currently rent a city-owned hangar at the airport on a month-to-month basis. Under the Act, an interest in real property is recognized as an economic interest. (§ 87103, subd. (b); Reg. 18703.2). An interest in real property includes a leasehold interest in real property within the official’s jurisdiction. (§ 82033.) However, the terms “interest in real property” and “leasehold interest,” as used in the Act, do not include the interest of a tenant in a periodic tenancy of one month or less. (Reg. 18233.) Accordingly, the hangar that you rent is not considered an economic interest in real property for the purposes of this analysis.

Nonetheless, even though the hangar does not constitute an economic interest for you under the Act, a public official always has an economic interest in his or her personal finances (§ 87103; Reg. 18703.5). So the remainder of this eight-step analysis must focus on whether a decision about making changes to the Hangar Rental Agreement will have a reasonably foreseeable material financial effect on your personal finances.

**Step Four: Is your economic interest in your personal finances directly or indirectly involved in the decision?**

In order to determine if the reasonably foreseeable financial effect of the decision on your personal finances is material, one must first determine if your personal finances are directly or indirectly involved in the decision. (Reg. 18704, subd. (a).) Regulation 18704.5 states:

“(a) A public official or his or her immediate family are deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family.”

Accordingly, if the decision has any financial effect on your personal finances, your personal finances would be directly involved in the decision. You have stated that a proposed change to the Hanger Rental Agreement would require you to pay for an increased level of insurance coverage that you are not currently required to maintain. You have stated that another proposed change to the rental agreement would expose you to potentially ruinous liability for actions by the city, its officers, employees, and agents, that you would not be able to insure yourself against. As such, your personal finances are therefore directly involved in the decision.

**Step Five: What is the standard for determining if an effect of the decision on your economic interest in your personal finances is material?**

Once the degree that your economic interest would be involved has been determined, step 5 of the analysis addresses the applicable materiality standard. Regulation 18705.5 declares that for the financial effect of a decision on an official's directly involved personal finances to be material, the effect must be \$250 or more in a 12-month period.

**Step Six: Is it reasonably foreseeable that the decision would affect your personal finances by \$250 or more in a 12-month period?**

An effect is considered “reasonably foreseeable” if the effect is “substantially likely.” (Reg. 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) In rendering advice on the issue of reasonable foreseeability, the Commission has noted that being required to pay increased insurance premiums (*Hawkins* Advice Letter, A-03-112) and potential civil liability (*Luna* Advice Letter, A-02-018) can each be reasonably foreseeable effects from a decision.

Although you have not advised us of the exact price of the increased insurance coverage that would be required of hangar tenants under the proposed changes, it appears that it would be well in excess of \$250 in a 12-month period. You have also advised us that the expansion of tenant liability under another of the proposed changes would be unlimited. So it is reasonably foreseeable that a decision regarding the proposed changes to the Hangar Rental Agreement will have a material financial effect on your personal finances such that you have a disqualifying conflict of interest in the decision, requiring you to disqualify yourself from participating in the decision unless an exception allows you to participate.

**Steps Seven & Eight: Public Generally & Legally Required Participation**

An official who otherwise has a conflict of interest in a decision may still participate under the “public generally” exception. This exception applies when the financial effect of a decision on a public official’s economic interests is substantially similar to the effect on a significant segment of the public.

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” rule. This rule applies only in certain very specific circumstances where the government agency would be paralyzed from acting. Your account of the facts does not provide us with sufficient information to determine whether this exception would apply.

**QUESTION NUMBER 2  
PROVIDING INFORMATION AND ADVICE TO STAFF**

As noted earlier, in addition to prohibiting a public official from making or participating in making a governmental decision in which the official has a financial interest, section 87100 prohibits a public official from in any way attempting to use his or her official position to influence a governmental decision in which the official has a financial interest.

Having now established that you have a financial interest in a decision regarding changes to the Hangar Rental Agreement, not only must you not make or participate in making that governmental decision, you must also not attempt to use your official position to influence the decision.

Regulation 18702.3, at subdivision (a), defines what constitutes attempting to use one’s official position to influence a decision of one’s own agency. It states that an official is attempting to use his or her official position to influence a decision if, “for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency.”

Applying the provisions of this regulation to your circumstances reveals that you are prohibited from providing information and advice to Airport Commission staff for the purpose of influencing a decision concerning proposed changes to the Hangar Rental Agreement.

**QUESTION NUMBER 3  
YOUR VIEWS EXPRESSED BY OTHERS**

As just described, the prohibition against your attempting to influence any member, officer, employee, or consultant of the Airport Commission concerning proposed changes to the Hangar Rental Agreement is very broad. You are therefore prohibited from using any third party as a conduit for expressing your views about the proposed changes to the agreement to the members of the Airport Commission or Commission staff.

By contrast, however, regulation 18702.4, subdivision (b)(2) specifies that attempting to influence a governmental decision, for the purposes of the Act, does not include communicating with the general public or the press. As such, you are certainly free to communicate your views about proposed changes to the Hanger Rental Agreement to the public and the press, and if some members of the public agree with your views, and, on their own initiative, wish to communicate those views to the personnel of the Airport Commission, there is nothing about that which would violate the provisions of the Act.

Additionally, regulation 18702.4 permits a public official to appear “as a member of the general public...[before his or her] agency in the course of its prescribed governmental function to represent himself or herself on matters solely related to the official’s personal interests....” Such an appearance, properly made, does not constitute making, participating in making, or attempting to influence a governmental decision. This exception would allow you to address the Airport Commission as any other member of the general public, but if you avail yourself of this exception you must be careful to avoid giving the impression that you are speaking in the interest of any other person or group, or that you are acting in any official capacity.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By:

Steven Benito Russo  
Senior Commission Counsel  
Legal Division

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